IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

KELCI STRINGER, individually, as representative of the Estate of Korey Stringer, Plaintiff, **v.** NATIONAL FOOTBALL LEAGUE, et al., Defendants.	CASE NO. 2:03-cv-665 JUDGE HOLSCHUH Magistrate Judge Abel **MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS ALL AMERICAN SPORTS CORPORATION AND RIDDELL, INC.**

Defendants All American Sports Corporation and Riddell, Inc. ("Riddell"), by and through undersigned counsel, move for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure. Plaintiff's failure to warn claims fail as a matter of law, because there is no duty to warn under Minnesota law of any risk of heat illness, which plaintiff associates with her decedent (Korey Stringer) wearing a football helmet and shoulder pads on a hot day during an NFL training camp. Nor did the lack of a warning cause Stringer's death; there is no evidence that a warning on the helmet and shoulder pads would have changed Stringer's decision to practice. The design defect claims fail because the evidence establishes no defect in Riddell's shoulder pads and helmets, and plaintiff has no contrary evidence. Likewise, she cannot establish causation. Plaintiff's warranty claims fail because they are barred in part by Minnesota law, and because plaintiff lacks the evidence required to establish a prima facie case. This Court

should therefore grant summary judgment in Riddell's favor on all claims asserted against it. The grounds for this Motion are fully explained in the attached Memorandum in Support.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing **Motion for Summary Judgment of Defendants All American Sports Corporation and Riddell, Inc. and Memorandum in Support** was filed electronically this 30th day of October, 2008. The parties will be notified of this filing through the Court's electronic filing system. All parties have access to the system and can obtain a copy of this Motion.

/s/ Robert C. Tucker
One of the Attorneys for Defendants
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and a football helmet. No expert has testified that Stringer could have practiced safely if he had not worn shoulder pads and a helmet.

To survive summary judgment, plaintiff must prove a duty to warn and that the lack of a warning caused Stringer's heat stroke. *See Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn.1986). Plaintiff's claims fail as a matter of law.

Whether a manufacturer has a duty to warn of a danger in a product is a question of law for the court to resolve – not the jury. *See Germann*, 395 N.W.2d at 924. There is no duty to warn of open and obvious risks, and no duty to warn of risks that are already known.

Riddell had no duty to warn Stringer, an experienced professional football player, that helmets and shoulder pads could make him hotter because that is open and obvious. *See, e.g., Holowaty v. McDonald's Corporation*, 10 F.Supp.2d 1078. 1084-85 (D. Minn. 1998). To the extent that shoulder pads and a football helmet affect the wearer's body temperature, it is due to fundamental and obvious characteristics of the equipment and there is no duty to warn. *See, e.g., Peppin v. W.H. Brady Co.*, 372 N.W.3d 369, 375 (Minn. App. 1985).

There is no duty to warn product users about known risks. *See e.g., Willmar Poultry Co. v. Carus Chemical Co.*, 378 N.W.2d 830, 835 (Minn. App. 1985); *Minneapolis Soc. Of Fine Arts v. Parker-Klein Assoc. Architects*, 354 N.W.3d 816, 821 (Minn.1984). Further, Vikings players, coaches and trainers were sophisticated users of football helmets and shoulder pads, and knew or should have known of the risk that wearing shoulder pads and a helmet on a hot an humid day could increase the player's body temperature. *Dahlbeck v. DICO Co.*, 355 N.W.2d 157, 163 (Minn. App. 1984); *Strong v. E.I. Dupont de Nemours Co.*, 667 F.2d 682 (8th Cir. 1981).

Plaintiff must show a causal link between the alleged failure to warn and the injury to overcome summary judgment. *See, e.g., Rients v. International Harvester Company,*

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KELCI STRINGER, individually, as representative of the Estate of Korey Stringer, Plaintiff, **v.** NATIONAL FOOTBALL LEAGUE, et al., Defendants.	CASE NO. 2:03-cv-665 JUDGE HOLSCHUH Magistrate Judge Abel **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS ALL AMERICAN SPORTS CORPORATION AND RIDDELL, INC.**

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Korey Stringer, a former NFL Minnesota Vikings player, died on August 1, 2001 from complications arising from exertional heat stroke. Plaintiff filed this action against the National Football League and NFL Properties, LLC (collectively the "NFL"), Riddell Inc. and All American Sports Corporation (collectively "Riddell"). The gist of her overlapping tort claims against Riddell is that a "defect" in Riddell's football helmet and shoulder pads caused Stringer to develop heat stroke. *See* Complaint ¶ 52. Because there is no expert testimony to establish a design or manufacturing defect, or causation, plaintiff relies solely on a failure to warn theory.

Her failure to warn claims, however, fail as a matter of law. The undisputed evidence establishes that Vikings trainers, players (including Korey Stringer) and coaches knew: (1) of the risk of developing heat illness during football practice in hot and humid conditions; (2) that

shoulder pads and helmets make players hotter; and (3) the signs and symptoms of heat illness and how to respond to it. Under Minnesota law, there is no duty to warn about open and obvious risks, no duty to warn about known risks, and no duty to warn sophisticated users when they are or should be aware of a risk.

Even so, there is no medical evidence that Riddell's shoulder pads and football helmet actually caused Stringer to develop heat stroke. Nor is there any evidence that a warning would have changed either Stringer's or the Vikings' decisions about practicing on July 31, 2001. Because plaintiff's remaining claims fail under Minnesota law, and for lack of evidence to establish fundamental elements of those claims, Riddell is entitled to summary judgment as a matter law.

II. PERTINENT FACTS

A. Timeline of Events at the Vikings Training Camp

The critical events in this case took place at the beginning of the 2001 Minnesota Vikings Training Camp. The team reported Sunday (7/29/01), had two practices Monday 7/30/01, and a practice Tuesday morning 7/31/01. At the end of practice Tuesday morning, Stringer collapsed on the field. He was hospitalized and died several hours later due to complications arising from heat stroke. Stringer reported to camp on 7/20/01 weighing 336 lbs. *See* Exh. A (weight records produced by Minnesota Vikings). He had a history of reporting to camp in poor physical condition, and often struggled during the first couple of days. *See* Exh. B, 5/13/02 Deposition of Michael Tice ("Tice") at 46-48.

1. Monday Morning (7/30/01)

Before the Monday morning practice, Stringer went to the training room to see Charles Barta (Vikings head athletic trainer), complaining of an upset stomach. Barta gave Stringer

antacids. *See* Exh. C, 5/14/02 Deposition of Charles Barta ("Barta") at 30. Per plaintiff's expert meteorologist, weather conditions that morning were dangerously hot and humid - potentially life threatening to anyone exercising in the heat. *See* Exh. D, 7/24/08 Deposition of Walter Lyons ("Lyons") at 28-29; 36-38. During this practice, the Vikings wore shells, meaning shorts, shoulder pads, jersey and helmet. *See* Barta at 137-38. Stringer also wore a cowboy collar,[1] gloves, two neoprene knee sleeves, undergarments, shoes, socks, and a t-shirt. *See* Exh. E, (photos from 7/30/01). Stringer practiced without incident Monday morning, though he complained to Tice (the Vikings offensive line coach) that he had an upset stomach, and thought he might have an ulcer. *See* Tice at 109-111.

2. Monday Afternoon (7/30/01)

For the afternoon practice the heat index ranged between 109-111 degrees, and Stringer struggled. During "practice period 3," roughly 15 minutes into the practice, Stringer vomited in the huddle. *See* Tice at 125; *See also* Exh. F (practice schedules identifying practice period number 3 on 7/30/01). Tice asked him if he was okay and Stringer said yes. *Id.* at 125-27. In the next practice period (period number 4), Stringer started throwing up "substantially," which concerned Tice because the activity in period 4 was not strenuous. *Id.* at 128. At that point, Tice tried to remove Stringer from practice but Stringer resisted, saying: "You can't do this to me. You can't take me out." *Id.*; *See also* Exh. G, 5/31/02 Deposition of (teammate) Matthew Birk ("Birk") at 49. Barta told Stringer he should stop practicing, but Stringer continued to resist. *See* Barta at 37, 44-45. Stringer vomited again, and Barta finally had to order him out of practice. *Id.* at 37-45. Stringer accompanied Barta to a nearby air-conditioned trailer that served as a first-aid station. *Id.* at 46, 307, 312. Stringer did not return to practice Monday afternoon.

[1] A cowboy collar is a device that is intended to protect the neck. It fits over the shoulders and rests underneath the shoulder pads. The cowboy collar covers roughly the same surface area as the shoulder pads, and it extends up the neck. Riddell did not manufacture any part of Stringer's football uniform except the shoulder pads and helmet. Stringer's cowboy collar was manufactured by McDavid, Inc.

3. Monday Evening (7/30/01)

That evening, Stringer called his wife and they talked for about 45 minutes, mainly about his experience on Monday. *See* Exh. H, 8/5/02 Deposition of Kelci Stringer ("Kelci Stringer") at 170-179. Stringer commented on the extreme heat, said that he couldn't stop throwing up, and that he had lost 6 pounds from vomiting. *Id.* at 171-74. He also told Kelci that when he was in the air-conditioned training room and team meetings - not exerting himself - he could not stop sweating. *Id.* at 172-74; Tice at 138. Kelci asked Stringer if he had been drinking water, and Korey responded that he "couldn't keep the water down." *See* Kelci Stringer at 172.

4. Tuesday Morning (7/31/01)

Before practice, Stringer complained of continued stomach problems. *See* Barta at 60-62. Barta cautioned Stringer to continue drinking fluids that day. *Id.* at 63-64. Barta looked at Stringer's weight loss statistics, and asked Stringer how he was feeling. Stringer reported that he was feeling fine. Barta therefore decided Stringer could practice. *Id.* at 259-60. Stringer reported to other coaches that he was feeling better as well. *See* Exh. I, 5/16/02 Deposition of (assistant offensive line coach) Dean Dalton ("Dalton") at 115-116.

By all accounts Stringer practiced well on Tuesday. *See* Tice at 285. The team practiced in full pads. In addition to Riddell shoulder pads and helmet, Stringer wore football pants with knee, thigh and hip pads, a t-shirt, a cowboy collar, a jersey, undergarments, shoes, socks and a neoprene knee sleeve. *See* Exh. J (photos of Stringer from 7/31/01 a.m. practice). Both Tice and Dalton observed Stringer during practice, watched the practice film, and concluded that Stringer: (1) practiced well; and (2) did not display any observable heat illness symptoms during regular practice. *See* Tice at 114-15, 169, 183-85, 285; Dalton at 39-40, 129, 132. Stringer's teammates also testified that he appeared to be fine, showed no symptoms of struggling with the heat, and was not showing signs of altered mental status. *See* Exh. K, 5/28/08 Deposition of David Dixon

("Dixon") at 62-64,110, 121; Birk at 84; 116; *See also* Exh. L, 6/24/02 Deposition of Fredrick Robbins ("Robbins") at 62.

Toward the end of practice, during a "one-on-one" drill, Stringer turned his ankle and Barta treated it. Barta observed no symptoms of heat illness during this 5-6 minute encounter. Barta asked Stringer how he was doing generally, and Stringer said that he was doing fine. *See* Barta at 67-69. Stringer returned to practice.

After formal practice ended, the offensive line had to do two extra drills: a "pass set" drill, and a drill that involved hitting a heavy bag called "Big Bertha." Stringer removed his shoulder pads and football helmet before the pass set drill. *See* Exh. M, 5/30/02 Deposition of (teammate) Kevin Withrow ("Withrow") at 37. He completed the pass set drill, then went down on one knee, and then got back up and moved to "Big Bertha." *Id.* at 36-37. The players were to do two sets, hitting Big Bertha ten times each set. Stringer did his first set, slipped on the surface, then laid down on the field. *See* Tice at 211-14; Dalton at 125-129; Birk at 82. Withrow saw Stringer on the ground and immediately called for a trainer. *See* Withrow at 43. When Matt Birk also observed him, and asked him if he wanted a trainer, Stringer told Birk, "yes, get a trainer." *See* Birk at 79-81. Trainer Paul Osterman arrived, and then Stringer got himself up from the ground and hit Big Bertha again, pushing through the bag and moving towards the air-conditioned trailer. *See* Withrow at 49-51; Osterman at 32-34, 39-41.

Inside the trailer, Stringer was initially lucid and responsive. *Id.* at 66-67. After about 30 minutes inside the trailer, Stringer laid down on the floor and became unresponsive. At that point, Osterman immediately sent student trainer Daniel Kearney to get help, who returned with Vikings' Medical Director Fred Zamberletti. *Id.* at 72-73.

When Zamberletti arrived, Stringer was unresponsive. Zamberletti believed Stringer was hyperventilating, and had Kearney place a bag over Stringer's face to treat hyperventilation. *See*

Exh. N, 5/29/02 Deposition of Fred Zamberletti ("Zamberletti") at 43-50. Osterman called an ambulance that arrived several minutes later and took Stringer to the hospital. *See* Osterman at 84. When Stringer arrived at the hospital, over an hour after he initially collapsed near Big Bertha, his core body temperature was 108.8 degrees Fahrenheit. He died several hours later of multi-organ failure caused by heat stroke.[2]

B. The Undisputed Facts Establish That Vikings Trainers, Coaches, and Players Were Already Aware of the Risks of Heat Illness, Ways to Prevent Heat Illness, the Signs and Symptoms of Heat Illness, and How to Respond

1. Vikings Coaches and Trainers Were Aware of the Risks of Heat Illness Associated With Conducting Football Practice in Extreme Heat and Humidity

Vikings coaches and trainers testified that they were aware that heat and humidity is dangerous for exercising athletes, and that the combination of heat and humidity that existed on July 30 and 31st, 2001 put players at risk for heat illness, including heat stroke. *See* Barta at 154-58, 292; Exh. O, 7/3/02 Deposition of (trainer) Jeffrey Otte ("Otte") at 125-26; Exh. P, 8/13/02 Deposition of (head coach) Dennis Green ("Green") at 53, 55, 61-63, 109, 223, 291-92; Dalton at 49-51, 188-89. Vikings coaches and trainers were also aware that heat stroke was potentially fatal. *See* Otte at 57, 111; Barta at 257; Exh. Q, 5/15/02 Deposition of (trainer) Paul Osterman ("Osterman") at 255; Zamberletti at 246; *See* Exh. R, 5/28/02 Deposition of (trainer) Daniel Kearney ("Kearney") at 10-12. They knew that it was important to consider the heat and humidity when planning and conducting practices, and trainers consulted with the coaching staff

[2] Kelci Stringer, the plaintiff in this case, sued the Minnesota Vikings, individual coaches and trainers, and team physicians in Minnesota state court. She claimed *inter alia* that the team negligently conducted practice on July 30 and 31, the team and physicians failed to treat and monitor Stringer after an episode of heat illness on the previous day, and that they failed to properly treat Stringer's heat stroke. The case against the Vikings was dismissed due to exclusivity of workers compensation as a remedy for a workplace injury. See *Kelci Stringer v. Minnesota Vikings Football Club, LLC, et al.*, 705 N.W.2d 746 (Minn. 2005). The claims against the physicians were either dismissed or settled.

about the heat and humidity on a regular basis. *See* Barta at 117-118, 130; Green at 51-53, 55, 61-63.

Coaches and trainers were also aware of other key risk factors for heat illness. They were aware of the effect of acclimatization on an athlete's ability to safely exercise in hot and humid conditions, and that it can take several days to acclimate. *See* Barta at 158-63; Zamberletti at 207-208; Otte at 126-27; Osterman at 134-37; Green at 98-99; Tice at 250-51; Dalton at 58-59, 185. They knew it was important for players to maintain physical fitness so they could handle practices in the heat. *See* Green at 99; Tice at 43. They knew that a prior heat illness could make a player susceptible to heat issues and to make sure a player is feeling better before returning him to practice. *See* Zamberletti at 203-204; Otte at 113-15. They knew that a player's weight was a risk factor. *See* Osterman 283-84, 87; Barta at 279; Green at 233-34.

2. Vikings Players and Staff Were Also Aware of Ways to Prevent Heat Illness

Vikings coaches and trainers considered the heat and humidity in planning and structuring practice. Every morning coach Green would obtain information on the heat index, consult with the training staff, and adjust practice or player participation accordingly. *See* Green at 51-53, 55, 61-63. It was Green's decision for the players to practice in full pads Tuesday morning, July 31. He was aware of the heat index that day, and testified that in deciding on uniform configurations he would always take the heat and humidity into account. *Id.* at 186. Coach Tice testified that in hot and humid conditions, he would take the heat into account and adjust practice activities and intensity as a result. *See* Tice at 105-107, 113, 186. Coach Dalton was aware that coaches should take the heat into account when scheduling practices. *See* Dalton at 178. Coach Green understood the importance of giving players adequate breaks for rest and

hydration on hot and humid days, and Vikings practices were structured to provide many opportunities for breaks. *See* Green at 256-57; Dalton at 157-62.

In addition to monitoring the practice schedule and intensity in hot and humid conditions, the Vikings staff regularly discussed with players the need to hydrate and cool themselves whenever possible. *See* Green at 96-97. Barta routinely reminded Vikings training staff to pay attention to player hydration and cooling on hot days. *See* Barta at 118-19; Osterman at 274. Every year at the beginning of camp, Barta gave a speech to players about heat issues, emphasizing hydration. *See* Birk at 34-36; Barta at 203-04; Withrow at 19. During his 2001 presentation (on 7/29/01) Barta noted that it was going to be warmer than normal, so players needed to drink extra fluids. *See* Tice at 174. Barta testified that it was his practice in his yearly heat presentation to advise players to remove their helmets when possible. *See* Barta at 284-85.

Vikings coaches and trainers knew how important it was to monitor players during practice in extreme heat and humidity for signs of struggle. *See* Otte at 104-06, 113; Osterman 243; Tice at 123-28, 168, 204-05; Dalton at 31-32. In the 2001 training camp, the Vikings staff arranged for an air-conditioned trailer to be on the field so that players could have a place immediately available for cooling and first aid. Green at 284-85; Barta at 214-16; Osterman at 42; Zamberletti at 237-38; Kearney at 33.

3. Vikings Trainers and Coaches Knew the Signs and Symptoms of Heat Illness and How To Respond

Vikings trainers knew the signs and symptoms of heat stroke, including altered mental status, cramping, changes in sweat patterns, and decreased performance. *See* Barta at 196-98; Osterman at 205-08; Otte at 42, 55, 182-83. They also knew the proper response to heat-related illness, including ceasing activity, hydration and body cooling. *See* Barta at 198; Otte at 143-44; Kearney at 11; Zamberletti at 170-171, 193, 203. Plaintiff's expert athletic trainer, Frank

Grimaldi, testified that he would expect any licensed athletic trainer to be able to recognize the signs and symptoms of heat stroke. *See* Exh. S, 7/21/08 Deposition of Frank Grimaldi, Jr. ("Grimaldi") at 43-44. He also testified that all licensed trainers should know that the proper response to heat stroke is to initiate rapid cooling and seek emergency care. *Id.* at 133-36.

The coaches also knew that it was important to monitor players in hot and humid conditions for any sign of heat illness. *See* Tice at 123-28, 168, 204-05; Dalton at 31-32. Coaches advised players that if they got too hot, sick or dizzy, they should call for a trainer. *See* Green at 97. Coaches testified that if a player shows signs of struggling in the heat—be it reduced performance, vomiting, altered mental status, or feeling sick—the player should be removed from practice and placed into the care of the trainers and physicians. *Id.* at 97, 102-103, 124-125; Tice at 205-207, 283; Dalton at 190. Vikings coaches and trainers demonstrated this awareness on July 30, 2001. When Stringer vomited and showed signs of struggling in the heat, they got him out of practice, told him to hydrate and got him into a cool environment. Not surprisingly, Stringer had no intention of leaving practice—in fact he refused to do so until the trainers and coaches ordered him off the field. *See* Statement of Facts, sec. II.A.2.

4. <u>Vikings Players Were Also Aware of the Risk of Heat Illness, and Did Not Need To Be Warned to Watch Their Teammates for Signs of Heat Illness - They Did That Without A Warning</u>

Matt Birk, the Vikings center, testified that he was aware that heat stroke can be a life threatening illness and that people have died due to extreme heat. *See* Birk at 39. Vikings players were aware that physical conditioning and hydration are important ways to prevent heat illness. *See* Withrow at 69. Dixon testified that even though he knows little about heat illness, the Vikings made him aware of the need to be cautious and hydrate to cool the body while exercising in the heat. *See* Dixon at 9-10. Fred Robbins testified that the Vikings "always give us precautions" to avoid heat-related illness. *See* Robbins at 35-36. Birk was also aware that if a

player wasn't feeling well, the player should take himself out of the drill and get into the air-conditioned trailer. *See* Birk at 93. Robbins also testified that he knew if he was feeling faint or dizzy, he should call for a trainer and indicate the problem. *See* Robbins at 38.

The undisputed evidence establishes that Vikings players and coaches specifically watched over Stringer for any signs of heat-related problems. For example, toward the end of the Tuesday practice, during a one-on-one drill, Dixon started to feel himself cramp. Because he knew of Stringer's history of heat-related problems and difficulty with heat the prior day, Dixon became concerned about Stringer, inquired about his status, and had a trainer bring him Gatorade. *See* Dixon at 53. According to Dixon, he was concerned about Stringer simply "[b]ecause I knew it was a long practice. I knew that, in pads, we were working extra hard. I knew that from Monday's experience that he had, that he could use the help that he needed." *Id*. at 53, 65-66. Other players likewise testified that when they saw Stringer show signs of struggling, they would inquire as to his status and get a trainer to help him if needed. *See* Withrow at 73-74; Birk at 60, 79-81.

C. Vikings Players and Staff Did Not Need To Be Warned That Wearing Football Pads and Helmets On A Hot and Humid Day May Make Players Hotter—That Is Open and Obvious and Already Known

Vikings staff knew that any clothing or equipment worn in high heat and humidity could affect heat loss, because it covers body surface area and reduces surface area available for evaporative cooling. *See* Barta at 279; *See* Dalton at 181. Otte believed that that "when a player is in full pads and wearing a helmet, they have a greater difficulty evaporating heat and allowing sweat to evaporate." *See* Otte at 165. Dr. David Fischer, the team physician, also testified that he discussed with Barta that helmets can effect evaporative cooling like any occlusive covering, and that players should remove their helmets when possible. *See* Exh. T, 9/17/02 Deposition of David Fischer, M.D. ("Fischer") at 271-72.

The players are also aware of the obvious fact that shoulder pads and helmets add weight, make them work harder, and become hotter. According to Dixon, on Tuesday morning he was hot because "[i]t felt--it felt, I want to say, heavy, you know, with the equipment that we had on…." Dixon at 54. Dixon explained that wearing shoulder pads and a helmet increased his workload: "You don't have those pads on in daily life. You don't have that extra weight on you, with a helmet, with the shoulder pads, with your thigh gear, with your knee gear, and your girdles, with a tight jersey on, all compact in … The equipment is heavy, you know." *Id.* at 66-67. Regarding Tuesday's practice, Dixon commented that "I knew that, in pads, we were working extra hard." *Id.* at 53.

Plaintiff's experts have testified that all people (including, of course, professional football players) know, as a general proposition, that the more clothing and equipment they wear on their bodies, the hotter they will get. *See* Exh. U, 7/1/08 Deposition of Lawrence Armstrong, Ph.D. ("Armstrong") at 102-103; *see also* testimony of Michael S. Wogalter, Ph.D, discussed *infra* at section II.D. They also agree that people understand as common knowledge that the more weight they carry during exercise, the more work they will do and the more metabolic heat they will generate. *See* Grimaldi at 146-147; *see also* testimony Wogalter testimony, section II.D.

It is "open and obvious" that wearing a football helmet and shoulder pads at a football practice on a hot and humid day will make a player hotter. It is evident that Vikings players and staff understood these obvious facts about football clothing and equipment. There is no need to warn an NFL football player, or the professional coaches or trainers of NFL football players, of the risks of heat illness when wearing a football helmet and shoulder pads during a football practice on a hot and humid day.

D. Warnings That Were Given With Riddell's Helmet and Shoulder Pads

Stringer wore a Riddell AF-2 Helmet which prominently displayed the following warning about the severe and significant risk of using the football helmet as a point of contact when playing football:

"WARNING: NO HELMET CAN PREVENT ALL HEAD OR NECK INJURIES A PLAYER MIGHT RECEIVE WHILE PARTICIPATING IN FOOTBALL. Do not use this Helmet to butt, ram or spear an opposing player. This is in violation of the football rules and such use can result in severe head or neck injuries, paralysis or death to you and possible injury to your opponent." See Exhibit EE (copies of engineering drawings specifying warnings for AF-2 helmets).[3] The helmet warnings also advised that "there is a risk injuries may also occur as a result of accidental contact without intent to butt, ram or spear. No helmet can prevent all such injuries." See Exhibit EE.

These warnings were also contained in the "helmet care and fitting guide" that accompanied the helmet when it was shipped. See Exhibit CC (AF-2 Helmet Care and Fitting Guide). The helmet and accompanying materials also contained warnings that using unapproved cleaners or other chemicals could negatively affect the helmet shell and reduce the helmet's ability to protect the head. See Exhibits EE and CC.

Stringer wore Riddell "Power" shoulder pads. Affixed to the shoulder pads was the following warning:

WARNING: Football is a dangerous contact sport which may result in serious injuries or even death. Although our equipment is designed to help reduce the risk of such injuries, there is

[3] The language on Riddell's warning label concerning the risk of head and neck injuries when a helmet is used to butt, ram or spear was developed and prescribed by the National Organizing Committee for Standards In Athletic Equipment ("NOCSAE"). Riddell's helmets, including the AF-2, are NOCSAE certified. In order for a helmet to be NOCSAE certified, this warning must be given.

no guarantee that any injury will be prevented by the use of this equipment." See Exh. FF, (photocopy of warning sticker that was affixed to Stringer's shoulder pads).

Neither the helmet nor the shoulder pads worn by Stringer—nor any of the other non-Riddell manufactured equipment worn by Stringer (pants, jersey, pads, cowboy collar, socks, shoes, gloves, neoprene knee sleeves)—contained a "warning" about the risk of heat illness if a football uniform and equipment were worn on a hot day in an NFL training camp.

E. Relevant Expert Testimony Related To Warnings and Causation

1. Warnings

Riddell's warnings expert, Thomas Ayres, Ph.D., does not believe a "heat warning" to professional football players on the helmet or shoulder pads is either a necessary or an effective communication of information because: (1) Vikings players, coaches and trainers were already aware of heat illness issues and a "heat warning" would not have accomplished anything (*see* Exh. V, 8/26/08 Deposition of Thomas Ayres, Ph.D. ("Ayres") at 49-54); and (2) professional football players, coaches and trainers know that players wearing football shoulder pads and a helmet will work harder and therefore get hotter on a hot day, and that clothing may interfere with heat loss to some extent. *Id.* at 149-151.

Plaintiff's warnings expert, Michael S. Wogalter, Ph.D., opines that there should be some sort of warning, the wording of which he has not devised, given by Riddell with its helmets and shoulder pads concerning heat and heat illness. That said, Wogalter testified that as a general proposition all people - including football players - know and understand that: (1) the more weight a person carries while exercising, the more work they have to do, and (2) the more clothing they wear, the hotter they get. *See* Exh. W, 7/22/08 Deposition of Michael S. Wogalter, Ph.D., at 63-65. Wogalter testified that it is obvious to everyone, including football players, that wearing a football helmet and shoulder pads on a hot day will increase body temperature, and

that he can tell just by looking at Riddell's shoulder pads and helmets that a person wearing them in the heat will ultimately get hotter than a person who isn't wearing them. *Id.* at 77-85.

Regardless, Wogalter claims that a warning should be given so that players "could keep watch and be vigilant to see if their buddy is having some problems." *Id.* at 87, 90-91. He testified that another purpose of a warning would be to pass information to coaches and trainers about the dangers of conducting football practice in hot and humid conditions. *Id.* at 83-84, 94, 96-97. Wogalter further claims that a warning should also instruct players to remove helmets when not involved in contact, but admits that based on his review of the Vikings practice video, Stringer voluntarily removed his helmet at least some of the time. *Id.* at 122-23.

Though Wogalter claims loosely that some sort of warning should be given, he testified that he has neither drafted nor tested any proposed warning to see if it would be effective. *Id.* at 119-120. Contrary to Dr. Wogalter's opinions, the undisputed testimony shows that Vikings players, coaches and trainers were already aware of these issues and did not need to be warned by Riddell that wearing a football helmet and shoulder pads on a hot day may increase the risk of developing a heat-related illness.

2. Causation

Riddell's experts give opinions that Stringer had numerous risk factors that predisposed him to heat stroke on 7/31/01, regardless of whether he wore shoulder pads and a helmet. *See* Exh. X, Expert Report of E.R. Eichner, M.D.; Exh. Y, Expert Report of Robert Dimeff, M.D.; Exh. Z, Expert Report of Michael Bergeron, Ph.D., FACSM. They opine that if he had gone through the same practice but without pads and helmet, Stringer still would have experienced heat stroke. *See* Exh. AA, 8/28/08 Deposition of E.R. Eichner, M.D. ("Eichner") at 67-68.

All of plaintiff's experts agree that heat stroke is caused by multiple factors. *See, e.g.*, Exh. BB, 8/7/08 Deposition of Pope Moseley, M.D. ("Moseley") at 135-37 (heat stroke is a

complex issue involving many factors, and the factors are different in every person). Plaintiff's experts agree that Stringer was prone to heat stroke, and was at serious risk of heat stroke on 7/31/01 regardless of whether he wore football pads and a helmet. *Id.*, *e.g.*, at 185-86 (Stringer had "numerous predisposing factors that would have increased his risk for heat stroke.").[4]

In light of the multitude of risk factors that combined to produce Stringer's heat stroke, **none of plaintiff's experts are prepared to give an opinion that Stringer would have avoided heat stroke if he had NOT been wearing Riddell's shoulder pads and helmet**. Armstrong claims that no one can give such an opinion. *See* Armstrong at 237-40, 249. Moseley testified that Stringer "absolutely" could have experienced heat stroke without wearing shoulder pads and a helmet. *See* Moseley at 158. He acknowledged that Stringer "was more likely than the average guy [to develop heat stroke]." *Id.* at 169. He has no opinion to a reasonable degree of medical certainty as to whether or not Stringer would have experienced heat stroke if he practiced with no pads and a helmet. *Id.* at 167-69. He equated the certainty of such an opinion with "like picking, you know, the NFL champion." *Id.* Grimaldi admitted that it was "probable or possible" that Stringer still would have experienced a heat-related illness if he had practiced with no helmet or shoulder pads on July 31. *See* Grimaldi at 181-89. In fact, both Grimaldi and Moseley testified that Stringer should have been held out of practice altogether on July 31, 2001 because he was at such risk. *Id.* at 123,143-45; Moseley at 184. No expert has testified that Stringer could have practiced safely without a helmet and shoulder pads.

[4] These predisposing factors included obesity (expressed as weight and/or high body mass index) [*see* Grimaldi at 66-67, 88-89; Moseley at 133-35, 179], lack of fitness [*see* Armstrong at 36-40; Moseley at 114-117, 153. 179-80], lack of acclimatization [*see* Armstrong at 32-34; Grimaldi at 69 -70, 119-120; Moseley at 111], extremely hot and humid environmental conditions [*see* Armstrong at 14-16; Grimaldi at 71, 90; Moseley at 96], preexisting illness [*see* Armstrong at 40; 47; Grimaldi at 72, 91-92; Moseley at 113-114, 181-83], prior episodes of heat illness including the heat illness Stringer experienced the day before [*see* Armstrong at 42; 193, 247; Grimaldi at 121], and dehydration [*see* Moseley at 150-51, 170].

III. LAW AND ARGUMENT

A. Plaintiff's Failure to Warn Claims Fail As a Matter Of Law

To prevail on a failure to warn claim, applying either strict liability or negligence principles, plaintiff must prove *inter alia* a duty to warn and that the lack of a warning caused plaintiff's injuries. *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn.1986).[5] Plaintiff's claims fail in both respects, and summary judgment is therefore proper. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Bragdon v. Abbott*, 524 U.S. 624, 652-653 (1998) (to avoid summary judgment, plaintiff must produce more than mere colorable evidence).

1. Riddell Had No Duty To Warn

The question of whether a manufacturer has a duty to warn of a danger in a product is a question of law for the court to resolve – not the jury. *Germann*, 395 N.W.2d at 924. In determining whether a duty to warn exists, the court looks at the event causing the damage and then looks back to the alleged negligent act. "If the connection is too remote to impose liability as a matter of public policy, the courts then hold there is no duty, and consequently no liability." *Id.; See also Balder v. Haley*, 399 N.W.2d 77, 81 (Minn.1987) (finding no duty to warn as a matter of law); *Drager v. Aluminum Industries, Corp.*, 495 N.W.2d 879, 884 (Minn. App. 1993). Applying that general standard, "**where the alleged danger is open and obvious, Minnesota courts do not require a warning**." *Holowaty v. McDonald's Corporation*, 10 F.Supp.2d 1078, 1085 (D.Minn.1998) (applying Minnesota law) (no duty to warn plaintiffs that coffee could

[5] Minnesota substantive law applies to plaintiff's theories of recovery (strict products liability and negligence under design defect and failure to warn; express and implied warranties) in this lawsuit against Riddell. *See, e.g., White v. Crown Equipment Corp.*, 160 Ohio App. 3d 503, 509-10; 827 N.E.2d 859 (2005). This Court's procedural law applies. *Id.* (finding that a forum's own procedural law governs).

cause severe burns if spilled) (emphasis added). Further, although a manufacturer may have a duty to warn of reasonably foreseeable dangers, there is **no duty to warn if the user knows or should know of a potential danger**. *Minneapolis Soc. of Fine Arts v. Parker-Klein Assoc. Architects*, 354 N.W.2d 816, 821 (Minn.1984), overruled on other grounds by *Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn.1990). This is especially true when the user of the product is a professional who should be aware of the characteristics of the product. *See Dahlbeck v. DICO Co*., 355 N.W.2d 157, 163 (Minn. App. 1984).

a. To the Extent that Riddell Shoulder Pads and Helmets Impact Body Temperature, It is the Result of Characteristics of the Product that are Open and Obvious

A manufacturer has no duty to warn of risks that are open and obvious. *See Holowaty,* 10 F.Supp.2d at, 1084-85 (applying Minnesota law) (no duty to warn plaintiffs that coffee could cause severe burns if spilled because the risk is open and obvious). Riddell had no duty to warn Stringer, an experienced professional football player, that helmets and shoulder pads could make him hotter because that is obvious. To the extent that shoulder pads and a football helmet make a difference in core body temperature, it is because of the obvious fact that they add weight and cover the body. *See* Moseley at 117-128; *See* Statement of Facts sec. II.C, II.D.

Riddell's warnings expert, Thomas Ayres, PhD, testified that it was common sense that people wearing heavy pads understand that this makes them work harder and therefore get hotter. Plaintiff's warnings expert agrees that all people know this, and that any piece of clothing has a similar effect. *See* Statement of Facts sec. II.D. People know about these issues because they are open and obvious, and flow from fundamental characteristics of heavy clothing on a hot and humid day.

Under Minnesota law, there is no duty to warn against risks that are inherent and obvious properties of the products at issue. *See Peppin v. W.H. Brady Co.*, 372 N.W.2d 369, 375 (Minn. App. 1985). In *Peppin*, the court ruled that a maker of aluminum wire markers had no duty to warn users that the wire markers may conduct electricity and cause a problem with machinery into which they are integrated. The court stated that "[t]here is certainly no usual duty to warn the purchaser that a knife or an axe will cut, a match will take fire, dynamite will explode, or a hammer may mash a finger." *Id*. The court stated that "[a] fundamental characteristic of aluminum is that it conducts electricity" and there was no duty to warn the user of this issue. *Id*.

Likewise, and even more obvious here, it is a fundamental and obvious characteristic of football helmets and shoulder pads that they must be made of durable materials to protect the body against violent collisions and as a result, will add weight and increase the wearer's workload. It is also a fundamental characteristic of this equipment that it must cover parts of the body. The weight and occlusive covering will make the wearer hotter, and this is common knowledge**.** *See* Wogalter at 78-90. There was no duty for Riddell to warn about these inherent and obvious characteristics. *See Peppin* 372 N.W.2d at 375; *See also Hoeg v. Shore-Master, Inc.*, 1994 WL 593919 at *1-2 (Minn. App. Nov. 1, 1994, unreported) (the elastic characteristics of a spring are obvious to users, and there is no duty to warn about risks associated with such characteristics), attached as Exh. DD-1.

Wogalter admits that the risk is open and obvious, but claims that people don't know the degree of risk. *See* Wogalter at 88-89. But the alleged "degree" of risk does not change the fact that the underlying risk is open and obvious. In *Holowaty v. McDonald's Corp.*, a plaintiff purchased coffee at a McDonald's and suffered second-degree burns after she spilled coffee while driving in her automobile. *Holowaty*, 10 F.Supp.2d at 1080-1081. The *Holowaty* court found that the average person in the community knows that hot coffee can cause burns. *Id.* at

1085. Plaintiff admitted she was aware of that danger but nevertheless claimed defendant had a duty to warn because the injury was more severe than a reasonable consumer would anticipate. *Id.* at 1084-1085. The court rejected that argument, finding that an alleged difference in the anticipated degree of danger does not make the risk associated with the use of the product any less obvious. *Id*. at 1085.

b. <u>There is No Duty to Warn Because the Vikings Trainers, Coaches and Players Were Already Aware of the Risk of Heat Illness Associated with Football Practice in the Heat</u>

Riddell had no duty to warn the Vikings coaches, trainers, or players in this case about the risk of heat illness associated with football practice in heat and humidity because they already knew. *See* Statement of Facts sec. II.B.1. They knew about the risks of heat illness, how to recognize it, and how to respond to it. *Id.* at II.B.2-3. Players were aware that if they experienced symptoms of heat illness they should stop practicing, get to a cool environment, and get help from a trainer. *See* Birk at 93; Robbins at 38. Players were vigilant in watching each other for signs of heat illness and got help for players in need. *See* Statement of Facts sec. II.B.4. And it is undisputed that football players (indeed all people) understand that wearing shoulder pads and a helmet on a hot day will make them hotter. *Id.* at sec. II.C, II.D.

Under Minnesota law, there is no duty to warn of a danger when the user knows or should know of the risk of danger. *Willmar Poultry Co. v. Carus Chemical Co.*, 378 N.W.2d 830, 835 (Minn. App. 1985) (a manufacturer has no duty to warn when a user or operator is aware of the dangers of a product); *Minneapolis Society of Fine Arts*, 354 N.W.2d at 821-822 (when the user knows or should know of the risk, there is no duty to warn). Here, the undisputed evidence establishes that the Vikings trainers, coaches and players were aware of the risks of heat illness associated with football practice in hot and humid conditions, and were aware that wearing

shoulder pads and a helmet would increase a player's body temperature. Therefore, there is no duty to warn as a matter of law.

Further, Vikings players, coaches and trainers were sophisticated users of shoulder pads and football helmets. An NFL player is thoroughly familiar with shoulder pads and football helmets after years of playing football, and participating in NFL training camps in hot weather. Under Minnesota law, a manufacturer has no duty to warn a sophisticated user who should be aware of the dangers that are inherent in the use of the product. *See Dahlbeck*, 355 N.W.2d at 163; *See also Strong v. E.I. Dupont de Nemours Co.*, 667 F.2d 682 (8th Cir. 1981) ("[T]here is no duty to warn if the user knows or should know of the potential danger, especially when the user is a professional who should be aware of the characteristics of the product); *Priefer v. Michelen Tire Corporation*, 1990 WL 68624 at *1-2 (Minn. App. May 29, 1990, unreported) (no duty to warn mechanic about risk of mismatching tires and rims because he is a sophisticated user aware of the risks, even if he is not aware of the extent of the risk), attached as Exh. DD-2. As set forth above, there is undisputed evidence that the Vikings players and staff were aware of the dangers associated with practicing in high heat and humidity, and they were aware that wearing shoulder pads and a football helmet on a hot day will make players hotter. Riddell has no duty to warn about these risks.

2. Even if Riddell Had A Legal Duty to Warn, It Is Entitled To Summary Judgment Based On Lack of Causation

a. There is no evidence that helmets and shoulder pads actually caused Stringer's heat stroke

Plaintiff must also show a causal link between the alleged defect and injury to overcome summary judgment. *Rients v. International Harvester Company*, 346 N.W.2d 359, 362 (Minn. App. 1984) ("even if a jury found a design defect, it would be sheer speculation for a jury to find that the design defect [of the tractor] caused the accident rather than any of these other possible

causes."). Likewise, in a failure to warn case, plaintiff must show that the lack of warning caused the injury. Where reasonable minds can arrive at only one conclusion, proximate cause becomes a matter of law and may be disposed of by summary judgment. *Lindsay v. St. Olaf*, 2008 WL 223661 at *3 (Minn. App. Jan. 29, 2008, unreported) (approving summary judgment on design defect claim when plaintiff failed to present any medical expert testimony to show that he suffered enhanced injuries), attached as Exh. DD-3.

Here, because plaintiff cannot establish that Riddell's shoulder pads and helmet caused Stringer's heat stroke, she cannot prove that the lack of a heat warning on the equipment proximately caused his death. Minnesota courts have uniformly held that expert opinion testimony is required to prove "in fact" causation if it involves medical issues that are outside the realm of common knowledge:

> Where a question involves obscure and abstruse medical factors such that the ordinary layman cannot reasonably possess well-founded knowledge of the matter and could only indulge in speculation making a finding, there must be expert testimony, based upon an adequate factual foundation that **the thing alleged to have caused the result not only might have caused it but in fact did cause it.**

Lindsay, 2008 WL 223661 at *4 (emphasis added.) (quoting *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 758, 762 (Minn.1998). Plaintiff must therefore establish with expert testimony not only that the Riddell helmet and shoulder pads **might** have contributed to Stringer's heat stroke, but that the shoulder pads and helmets **did in fact** cause Stringer's heat stroke. *See, e.g.*, *Willert v. Ortho Pharm. Corp.*, 995 F.Supp. 979, 983 (D. Minn. 1988) (granting summary judgment to manufacturer of antimicrobial medication where there was no expert evidence that the medications in fact caused plaintiff's autoimmune and neurological disorders).

Riddell's experts opine that Stringer had numerous risk factors predisposing him to heat stroke on 7/31/01, regardless of whether he wore shoulder pads and a helmet. *See* Exh. X,

(Report of E.R. Eichner, M.D.); Exh. Y, (Report Robert Dimeff, M.D.); Exh. Z, (Report of Michael Bergeron, Ph.D., FACSM). They opine that if Stringer had gone through the same practice, but without pads and helmet, Stringer still would have experienced heat stroke. *See* Eichner at 67-68.

Plaintiff's experts agree that Stringer was prone to heat stroke, and was at serious risk of heat stroke on 7/31/01 independent of whether he wore football pads and a helmet[6]. *See, e.g.*, Moseley at 185-86 (Stringer had "numerous predisposing factors that would have increased his risk for heat stroke."). They agree that multiple factors predisposed Stringer to heat stroke including obesity, lack of acclimatization, lack of fitness, extremely hot and humid conditions, a pre-existing gastrointestinal illness, prior episodes of heat illness, and dehydration. *See* Statement of Facts sec. II.D.

In light of the multitude of factors that combined to produce Stringer's heat stroke, it is not surprising that **none of Plaintiff's experts are prepared to give an opinion that Stringer would have avoided heat stroke had he NOT been wearing Riddell's shoulder pads and helmet**. *See* Statement of Facts sec. II.D. Armstrong claims that no one can give such an opinion. *See* Armstrong at 238-40, 249. Plaintiff's other experts admit that it was "possible or probable" that Stringer still would have experienced heat stroke, given his risk level. No expert has testified that Stringer could have practiced safely without a helmet and shoulder pads. *See* Statement of Facts sec., II.D.

[6] All of Plaintiff's experts rely heavily on a study created for this litigation by Dr. Lawrence Armstrong to support their stated opinions. However, while not dispositive here, Armstrong's study shows that the football shoulder pads and helmets did not make a meaningful difference in core body temperature of test subjects. Further, the small differences that were observed did not appear until after 20 minutes into a continuous exercise activity, with no breaks or water allowed, which is nothing like what happened at the Vikings training camp. *See* Exh. X, Eichner Report p 5-6; Exh. Z, Bergeron Report at 18, 19, 22; See Exh. Y, Dimeff Report at sec. IV. Even using this flawed approach, Armstrong's study revealed little or no difference in body temperature related to the shoulder pads and helmet. *See* Eichner at 63, 68, 177-78. This study does not prove that shoulder pads and football helmets cause heat stroke in normal, foreseeable football conditions, and does nothing to establish that Riddell's equipment caused Stringer's heat stroke.

The most that plaintiff's experts can say is that Riddell's shoulder pads and helmet *might* have contributed to Stringer's temperature, and therefore his heat stroke. This is insufficient as a matter of law and summary judgment is therefore appropriate.[7] *Lindsay v. St. Olaf*, 2008 WL 223661 at *3-4; *Bell v. Ohio State University,* 351 F.3d 240, 253 (6th Cir. 2003) (conclusory and unsupported allegations, rooted in speculation, are insufficient to withstand summary judgment).

b. The Evidence Shows That Stringer Would Not Have Practiced Differently Even If a Warning Had Been Given

To prove causation, plaintiff needs to prove that Stringer or the Vikings would have acted differently if Riddell had warned them of the risk of heat illness. *See Holowaty,* 10 F.Supp.2d at 1085-86; *Tuttle v. Lorillard Tobacco Company*, 377 F.3d 917, 924-925 (8th Cir. 2004) (applying Minnesota law).[8] In *Tuttle v. Lorillard Tobacco Co.*, the widow of a baseball player who chewed smokeless tobacco and died of oral cancer brought a lawsuit alleging that the manufacturers failed to warn the baseball player of the dangerous properties and addictive nature of smokeless tobacco. *Id.* at 924. The court held that to establish causation, the widow must present some affirmative evidence that the baseball player would have refrained from using smokeless tobacco had the manufacturers provided a warning. *Id.* at 925. Because there was no such evidence, the claim failed as a matter of law. *Id.* at 924-925.

[7] Because Plaintiff cannot establish that Riddell's shoulder pads and helmets caused Stringer's heat stroke, plaintiff cannot establish that Riddell's products created a "risk" triggering a duty to warn. This means the "connection" between the lack of a warning on Riddell's helmet and Stringer's heat stroke is too remote to impose liability as a matter of law. *See Germann,* 395 N.W.2d at 924 (Minn.1986). There is no duty to warn about dangers that do not exist. *See, e.g., Westerberg v. School District No. 792,* 148 N.W.2d 312, 316 (Minn.1967).

[8] *See also Krein v. Raudabough*, 406 N.W.2d 315, 320 (Minn. Ct. App. 1987) (affirming refusal to instruct jury on failure to warn because the product user presented "no evidence at trial that he would have acted different had GMC provided a warning" and trial court deduced "no evidence which would reasonably tend to prove that GMC's failure to warn . . . proximately caused injuries"); *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 276 (Minn.1984) (if injured plaintiff would not have acted any differently had there been a warning, manufacturer's failure to warn is not cause of injury).

i. There Is No Evidence That a Warning Would Have Changed Stringer's Actions

Here, as in *Tuttle*, plaintiff has no evidence that Stringer would have refrained from practice or done anything differently if there had been a heat warning on Riddell's shoulder pads and helmet. To the contrary, the evidence shows that Stringer ignored clear warnings his body was sending him. Despite vomiting several times and clearly struggling with the heat, Stringer resisted the staff's attempts to remove him from practice on July 30. *See* Statement of Facts sec. II.A.2. He consistently told his coaches, trainers and fellow players on Tuesday 7/31/01 that he was "fine." *Id.* at. II.A.4. There is no evidence to support the notion that a warning would have caused him to refrain from practicing on Tuesday. Applying *Tuttle*, summary judgment is warranted here.

Wogalter suggests that a warning on the helmet may have caused Stringer to remove the helmet when not playing. But Barta testified that he included helmet removal in his discussion of heat issues at the beginning of every camp. *See* Barta at 284-85. More importantly, the practice video reveals that Stringer removed his helmet voluntarily, without prompting from a warning, when he was not involved in plays. *See* Armstrong at 195; Wogalter at 122-23. *See also* Exh. E and Exh. J (photos from 7/30/01 and 7/31/01 practice). Dr. Eichner, who has reviewed the video thoroughly, testified that Stringer removed his helmet every time he came off the field. *See* Eichner at 29-31. A warning would not have "induced" this behavior, because Stringer already did it. An NFL player does not need a warning to take his helmet off if he is hot.

ii. There Is No Evidence that A Warning Would Have Changed The Actions of Vikings Players and Staff

Wogalter speculates that a warning may serve to educate coaches and trainers about the risk of heat illness, and how to prevent it, recognize it, and treat it. *See* Wogalter at 83-87, 90-97. But there is undisputed evidence that Vikings trainers and coaches already understood everything

Wogalter seems to think Riddell needed to tell them. *See* Statement of Facts sec. II.B. Coaches and trainers made decisions about practice, including when and what would be done, and who would participate. They did so with full knowledge of the risks, and with an understanding that shoulder pads and helmets might make players hotter. *Id.* at sec. II.B. and C. There is no reason to believe that a warning on Riddell's shoulder pads and helmets would have changed these decisions. In the absence of affirmative evidence that a warning would have changed their behavior, summary judgment is appropriate. *See, e.g., Holowaty*, 10 F.Supp.2d at 1085-86; *Tuttle*, 377 F.3d at 924.

Wogalter also speculates that a warning might make players more alert to watch their fellow players for any signs of heat illness. But the evidence demonstrates that Vikings players did this naturally—they did not need a warning to prompt their behavior. *See* Statement of Facts sec. II.B.4. And there is no evidence that a warning would have changed the players' behavior. Plaintiff therefore cannot show a "direct causal nexus" between the absence of any warning and Stringer's heat stroke. *See, e.g., Balder*, 399 N.W.2d at 81 (finding no causation as a matter of law where plaintiffs ignored obvious risks and there was no evidence that a warning would have altered their behavior); *Holowaty*, 10 F.Supp.2d at 1085-86 (finding no causation because plaintiff knew that coffee was hot and could cause burns if spilled, and there was no evidence that a warning would have changed behavior).

3. Wogalter's Warnings Opinions Should Be Excluded Because He Has Not Drafted or Tested Any Warning

Here, plaintiff's warnings expert testifies that there should be some sort of warning, but is vague about the specifics. The reason is simple—Wogalter is vague because he has not actually drafted any warning or tested the efficacy of any proposed warning. *See* Wogalter at 119-120; *Jaurequi v. Carter Mfg. Co. Inc.*, 173 F.3d 1076, 1084-1085 (8th Cir. 1999) (excluding expert

evidence proffered by engineers on warning defect as the opinions were "extremely questionable" because neither expert created or even designed a warning device which would have been more appropriate, much less tested its effectiveness); *See also Bourelle v. Crown Equipment Corp*., 220 F.3d 532, 538-39 (7th Cir. 2000) (warnings expert's opinions are unreliable due failure to even draft a proposed warning or test its efficacy). On this basis alone, the warning opinions should be excluded and summary judgment is therefore appropriate. *See Id.* Wogalter's bald opinion that some kind of warning should be given, with no specifics or testing to support that opinion, is not sufficient to create a genuine issue of material fact as to duty to a warn or causation.

4. Any Legal Duty to Warn Was Discharged Because the Vikings' Trainers, Coaches and Staff Were Sophisticated Intermediaries – and In Fact They Did Warn.

Even if the risk of heat illness were not an open and obvious risk, and even if Vikings' players were not sophisticated users, Riddell discharged any legal duty to warn because the Vikings' trainers, coaches and staff were sophisticated intermediaries. Under the "sophisticated intermediary" rule, a manufacturer/supplier can rely on a knowledgeable intermediary to convey warnings if "the intermediary [has] a level of sophistication and knowledge equal to that of the manufacturer…." *Ritchie v. Glidden Co.*, 242 F.3d 713, 724 (7th Cir. 2001). Also known as the "knowledgeable purchaser" defense, the underlying theory - as applied here - is that manufacturers and sellers "act reasonably if they do not warn intermediate purchasers of dangers of which the intermediate purchasers are already knowledgeable." *Smith v. Walter C. Best, Inc.*, 927 F.2d 736, 739 (3d Cir. 1990), quoting Note, *Failures to Warn and the Sophisticated User Defense*, 74 Va. L. Rev. 579, 589 (1988). As noted by the Seventh Circuit Court of Appeals, "[d]elegation of the duty to warn makes particular sense where the manufacturer cannot control

how the intermediary will use the product …." *Taylor v. Monsanto*, 150 F.3d 806, 808 (7th Cir. 1998).

The Minnesota Supreme Court has applied the sophisticated intermediary rule. In *Minneapolis Society of Fine Arts v. Parker-Klein Assocs. Architects, Inc.*, 354 N.W.2d 816 (Minn. 1984), syllabus, para. 2, *rev'd on separate grounds*, *Hepka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990), the defendant provided the brick for the wall construction of a $25 million expansion project; when the glazed brick failed shortly after project completion, the Minneapolis Society of Fine Arts ("MSFA") claimed that the brick manufacturer failed to adequately warn of potential brick failure related to the wall design. *Minneapolis Society of Fine Arts*, 354 N.W.2d at 821. The Court held that a glazed brick manufacturer had no duty to warn brick purchasers of the proper design of the walls into which the brick was to be incorporated because the purchasers' *architects* (the intermediary) knew or should have known that the brick would fail if the walls were not designed to allow the brick to "breathe."

In reversing a jury verdict in favor of MSFA on its negligence claims, the Supreme Court first noted that "[g]enerally, there is no duty to warn if the user knows or should know of potential danger." *Id*., citing *Strong v. E.I. du Pont de Nemours & Co.*, 667 F.2d 682 (8th Cir. 1981). Because the evidence was "overwhelming" that MFSA's *architects* should have known of the sensitivities of glazed brick, the court concluded that "there existed no duty [on the part of the brick manufacturer] to warn of potential problems … and that [it] was justified in relying on the architects and builders to properly apply the brick" in accordance with industry standards. *Id*. at 822. It likewise held that the brick manufacturer "breached no duty to inform the MSFA or its agents that on eight [prior] occasions its glazed brick had spalled" under similar circumstances. *Id*. at 822-823. To hold otherwise, the Court reasoned, would make the brick manufacturer an "absolute warrantor of its brick even though trained architects, who should have

had knowledge of industry standards, selected the brick and designed the walls, and experienced engineers oversaw the construction." *Id*. at 822.

The same analysis applies in this case. The evidence is overwhelming that the Vikings trainers, coaches, and medical staff were aware of the risks of heat illness and knew how to address the risk in the context of football practice. The undisputed evidence also shows that they were aware that wearing a football helmet and shoulder pads during practice on a hot day will make the player hotter. Riddell was justified in relying on the Vikings coaches, trainers, and medical staff to apply their knowledge as they made decisions concerning the timing, conduct, and participation of players in Vikings' football practices. These intermediaries were in a position to know and assess all of the relevant factors that influence heat illness, and Riddell had no duty to warn them further. As in *Minneapolis Society of Fine Arts*, the intermediaries' knowledge effectively discharged any duty to warn that Riddell may have otherwise had.

B. Plaintiff's Design Defect Claims Do Not Survive Summary Judgment

To survive summary judgment on her design defect claims, under either a negligence or strict products liability theory, plaintiff must establish a genuine issue of material fact as to whether: 1) the Riddell helmet and shoulder pads were in a defective condition that rendered them unreasonably dangerous to Stringer; 2) the defect existed when it left Riddell's control; and 3) the defect was the proximate cause of Stringer's injury. *See Bilotta v. Kelley Co.*, 346 N.W.2d 616, 623 (Minn.1984); *see also Johnson v. John Deere Co.*, 935 F.2d 151, 155 (8th Cir. 1991) (Minnesota courts have fused together negligence theory into a traditional strict liability theory to determine whether a product was defective). She cannot.

1. There Is No Competent Testimony Or Evidence That The Riddell Shoulder Pads and Helmet Were Defectively Designed

Plaintiff's design defect claims fail because there is no expert testimony to establish that the Riddell helmet and shoulder pads were defectively designed. *Seaton v. County of Scott*, 404 N.W.2d 396, 399-400 (Minn. App. 1987) (affirming trial court's holding that expert testimony was required to develop the standard of care for road and bridge design); *see also Mozes v. Medtronic, Inc.*, 14 F.Supp.2d 1124, 1128 (D. Minn. 1998). Plaintiff must not only establish that the product was in a defective condition, but also that it was unreasonably dangerous. *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 96 (Minn.1987). To satisfy this requirement and avoid summary judgment, plaintiff has to show by expert testimony the existence of a feasible, alternative safer design for the Riddell helmet and shoulder pads. *See e.g.*, *Bruzer v. Danek Medical Inc.*, 1999 WL 613329 at *3-4 (D. Minn. Mar. 8, 1999, unreported) (granting summary judgment on design defect claim; plaintiff did not establish that product was unreasonably dangerous in the absence of expert evidence of the existence of a feasible, alternative safer design), attached as Exh. DD-4.[9] Because plaintiff lacks critical expert testimony to establish a design defect, that claim fails as a matter of law.

2. Even so, There is no Expert Testimony That The Riddell Helmet And Shoulder Pads In Fact Caused Stringer's Heat Stroke

Plaintiff must also show a causal link between the alleged design defect and injury to overcome summary judgment. *Rients v. International Harvester Company*, 346 N.W.2d 359, 362 (Minn. App. 1984). As set forth *supra* in section II.A.2.a, plaintiff's experts have not opined that

[9] *See also Kallio*, 407 N.W.2d at 96-97 (to establish that a product is "unreasonably dangerous" normally requires plaintiff to produce evidence of the existence of a feasible, alternative safer design); *McCormick v. Hankscraft Co.*, 154 N.W.2d 488, 497 n.3 (Minn.1967) (finding evidence of an alternative safer design insufficient where experts failed to testify how the suggested changes would have prevented plaintiff's injuries).

Riddell's shoulder pads and football helmet actually caused Stringer's heat stroke. Plaintiff therefore cannot prove causation and the design defect claims fail as a matter of law.

C. Plaintiff's Implied Warranty Claims Fail As A Matter Of Law For Three Separate Reasons

1. Plaintiff's Implied Warranty Claims Are Preempted By Her Strict Products Liability Claim Based On Personal Injury

Under Minnesota law, "[s]trict products liability has effectively preempted implied warranty claims where personal injury is involved." *Masepohl v. American Tobacco Co., Inc.*, 974 F.Supp. 1245, 1253 (D. Minn. 1997) (applying Minnesota law).[10] The Minnesota Supreme Court has noted that, since the adoption of the Restatement, Torts (2d) § 402(A), "the liability of a seller to persons injured by its defective product is not one governed by the law of contract warranties but the law of strict liability in torts". *McCormack v. Hankscraft Co.*, 154 N.W.2d 488, 499-501 (1976). For this reason, Riddell is entitled to summary judgment on plaintiff's implied warranty claims. *See, e.g., Nimeth v. Prest Equip. Co.*, 1993 WL 328767 (Minn. App. Aug. 31, 1993, unreported), at *1-2, attached as Exh. DD-5.

2. Riddell Disclaimed the Implied Warranties

Under Minnesota law, the implied warranties of merchantability and fitness for a particular purpose may be disclaimed. Minn. Stat. § 336.2-316(2). They are properly disclaimed when the disclaimer is in writing, is conspicuous, and mentions merchantability. *Minnesota Forest Products, Inc. v. Ligna Machinery, Inc.*, 17 F.Supp.2d 892, 917 (D. Minn. 1998) (applying Minnesota law); Minn. Stat. § 336.2-316(2). With regard to implied warranty of fitness, no particular language is required to disclaim the warranty, but the statute provides that the language "is sufficient if it states, for example, that '[t]here are no warranties which extend beyond the

[10] *See also Goblirsch v. Western Land Roller Co.*, 310 Minn. 471, 476, 246, N.W.2d 687 690 (Minn. 1976) (no error or prejudice to plaintiff where trial court refused to submit the case to the jury on express and implied warranty theories when court instructed jury on the more favorable strict liability theory; court reasoned implied warranty instruction would have been redundant and possibly confusing).

descriptions on the face hereof.'" Minn. Stat. § 336.2-316(2); *see also Minnesota Forest Products, Inc.*, 17 F.Supp.2d at 917.

Here, Riddell properly disclaimed both implied warranties in the materials that accompanied the sale of its helmets. *See* Exh. CC, (AF-2 Helmet Care and Fitting Guide). In those materials, the "warranty" section clearly disclaims all implied warranties, including the implied warranty of merchantability and fitness for a particular purpose. For this second reason, Plaintiff's implied warranty claims therefore fail as a matter of law.

3. Because There Is No Proof of Defect That Caused Injury, Plaintiff's Implied Warranty Claims Fail

To establish a breach of implied warranty claim, plaintiff must show the existence of a warranty, a breach of it, and evidence of a causal connection between the breach and the damages suffered. *Nimeth*, 1993 WL 328767, at *2 (citing *Peterson v. Bendix Home Sys., Inc.*, 318 N.W.2d 50, 52-53 (Minn. 1982)). Since plaintiff fails to bring forth evidence of a defect, (*see* sec. II.B.1), there is no evidence to support the essential element that an implied warranty was breached. Even if plaintiff could show that a defect existed, there still must be proof that an alleged breach of warranty caused injury. As set forth above, there is no sufficient expert testimony to establish causation in this case.

D. Because There is No Evidence That Riddell Made An Express Warranty To Stringer or the Minnesota Vikings, Plaintiff's Express Warranty Claims Fail

Plaintiff alleges that Riddell expressly warranted that the helmet and shoulder pads were safe for their intended purpose. *See* Complaint, ¶ 60. To establish an express warranty claim, plaintiff must show the existence of a warranty, breach and causation. *See Peterson v. Bendix Home Sys., Inc.*, 318 N.W.2d 50, 52-53 (Minn.1982). Creation of an express warranty requires an express affirmation of fact—a promise to the buyer—that becomes part of the basis of the bargain. *Bea v. Hoehne Bros.*, 2004 WL 26591 at *4 (Minn. App. Jan. 6, 2004, unreported)

(citing Minn. Stat. § 336.2-313), attached as Exh. DD-6. Here, plaintiff has not presented any evidence that Riddell made a statement of fact or affirmation to the Minnesota Vikings or Stringer about the helmet and shoulder pads. There is also no evidence that the Vikings or Stringer relied upon any such statement of fact or affirmation by Riddell in purchasing the Riddell equipment. Morever, because plaintiff cannot prove that Riddell's shoulder pads and helmet were defective or dangerous, plaintiff cannot establish breach of such a warranty and cannot prove causation. Without this evidence, plaintiff's express claim fails as a matter of law.

IV. CONCLUSION

Based on the foregoing, Riddell is entitled to summary judgment as a matter of law on all claims asserted against it. There is no duty to warn because the risk that wearing shoulder pads and a football helmet might make a player hotter during football practice on a hot and humid day is open and obvious, and because the Vikings players, trainers and coaches were aware of this risk, and were sophisticated users. Nor is there competent expert testimony on causation. Plaintiff's remaining claims likewise fail for lack of critical evidence required under Minnesota law to support her design defect and warranty claims. For these reasons, this Court should grant summary judgment in Riddell's favor.

Respectfully submitted,

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